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Supreme Court, U.S.
FILED

05-36 JUL 5 - 2005

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No.

IN THE

# Supreme Court of the United States

GOLDEN PACIFIC BANCORP,

*Petitioner*,

*v.*

FEDERAL DEPOSIT INSURANCE CORPORATION,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

When the federal government closes a bank and liquidates its assets, "the remainder of the proceeds, if any, shall be paid over to the shareholders of such association . . . ." 12 U.S.C. § 194. In this case, the government closed a bank owned by petitioner and liquidated its assets, but engaged in a series of sham transactions to avoid distributing the remainder of the proceeds to petitioner. Did the court of appeals err in concluding that petitioner cannot maintain an action for equitable relief against a government receiver that blatantly violates its fiduciary duties?

## PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The caption contains the names of all parties to the proceeding in the court below. Golden Pacific Bancorp, a privately held corporation, owns more than 90 percent of the shares of Golden Pacific National Bank, a federally chartered financial institution closed in 1985 by order of the Comptroller of the Currency.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Golden Pacific Bancorp, for its own account and derivatively on behalf of Golden Pacific National Bank, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 375 F.3d 196. A previous opinion of the court of appeals (App., *infra*, 73a-90a) is reported at 273 F.3d 509. The underlying orders of the district court (App., *infra*, 19a-35a; 36a-72a; 91a-104a; and 105a-112a) are not officially reported, but are available at 2003 U.S. Dist. LEXIS 10982; 2002 U.S. Dist. LEXIS 24961; 2000 U.S. Dist. LEXIS 8240; and 1997 U.S. Dist. LEXIS 15537, respectively.

## JURISDICTION

The judgment of the court of appeals was entered on July 14, 2004. A timely petition for rehearing was denied on February 2, 2005. App., *infra*, 113a-114a. On April 25, 2005, Justice Ginsburg extended the time within which to file this petition to and including July 5, 2005. No. 04-A909. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

As of 1985, 12 U.S.C. § 194 provided:

> **§ 194. Dividends on adjusted claims; distribution of assets**
>
> From time to time, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims pre-

> viously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

Pursuant to this Court's Rule 14.1(f), the pertinent text of the following statutes is set forth in the Appendix, *infra*, at 119a-122a: 12 U.S.C. §§ 191 & 1821 (1985); and 26 U.S.C. § 7507 (1985).

## STATEMENT

In 1985, the federal government seized a bank owned by petitioner. After all depositors and other creditors were paid in full (and after the government receiver paid itself approximately $14.3 million in alleged liquidation expenses), the receivership estate held net assets exceeding $15 million. Federal law requires in such situations that the receiver "pa[y] over to the shareholders" any "remainder of the proceeds." 12 U.S.C. § 194. The government receiver, however, refused to return this money to petitioner—its rightful owner. Instead, the government receiver chose to keep the money for itself through a series of sham transactions unheard of in the long history of federal banking regulation. Petitioner sued, alleging that the government receiver's flagrant self-dealing gave rise to equitable claims for monetary relief. The district court ultimately granted summary judgment to the government, and the court of appeals affirmed. This petition follows.

1. Petitioner Golden Pacific Bancorp owned more than 90% of the stock of Golden Pacific National Bank ("Bank"), a federally chartered institution. App., *infra*, 74a. In 1985, the Office of the Comptroller of the Currency (OCC)—the primary regulator of national banks—closed the Bank upon a finding of insolvency. *Ibid.* Two different courts of appeals subsequently held that petitioner could not challenge the OCC's insolvency determination under the Federal Tort Claims Act, *Golden Pacific Bancorp* v. *Clarke*, 837 F.2d 509 (D.C. Cir.), *cert. denied*, 488 U.S. 890 (1988), or the Takings

Clause, *Golden Pacific Bancorp* v. *United States*, 15 F.3d 1066 (Fed. Cir.), *cert. denied*, 513 U.S. 961 (1994).

After the Bank was closed by the OCC, it was placed into a receivership administered by the Federal Deposit Insurance Corporation (FDIC), a federally chartered corporation and independent agency of the federal government. App., *infra*, 74a-75a. One of the FDIC's functions was to liquidate banks closed for insolvency by the OCC. *See* 12 U.S.C. §§ 191, 1821(c) (1982). The receivership commenced shortly after the Bank was closed on June 21, 1985, and was terminated on November 1, 1995. *Id.* at 88a, 100a n.6. By January of 1990, however, the FDIC had paid off *all* of the Bank's depositors and other creditors *in full*, in addition to charging the estate for millions of dollars in alleged liquidation expenses. *See id.* at 4a-5a; C.A. App. A-3018; note 1, *infra*.

Before it began liquidating the Bank's assets, the FDIC obtained information indicating that the Bank had in fact been solvent when it was deemed insolvent and closed by the OCC. *See* App., *infra*, 9a, 39a. Moreover, the estate of the Bank remained solvent after all of its debts had been paid: By November of 1989, with few if any unpaid debts remaining, the estate had "assets of $23,618,669, liabilities of $8,758,150, and equity" of $16,860,520. *Id.* at 29a n.11.

Federal law requires the receiver of a closed bank to distribute the remainder of the receivership estate to the equity owners of the bank. 12 U.S.C. § 194 ("the remainder of the proceeds, if any, *shall* be paid over to the shareholders of such association") (emphasis added). In this case, however, the FDIC failed to adhere to this statutory mandate. Even though the Bank was solvent when it was closed, and the estate had substantial net assets remaining after all depositors and creditors were paid, the owners of the Bank—principally petitioner—received not a penny.

The FDIC avoided its statutory obligation to distribute the receivership estate to the shareholders by engaging in a series of sham transactions designed to deplete the receiver-

ship estate of all surplus assets. Principal among these was the FDIC's decision to pay *itself* "interest" on the sums used (from the Bank's estate) to satisfy the claims of depositors and other creditors—and to do so at a rate of nine percent per annum. The undisputed evidence, however, showed that at the time it was *not* the FDIC's practice to charge so-called "post-insolvency interest." Indeed, one witness testified that "[i]t was the FDIC policy *not* to pay interest after the date of closing. . . . I don't think the FDIC took it upon itself to pay interest after closing unless so ordered by a court." App., *infra*, 16a (quoting Hovan Dep. 192-95) (emphasis added). But the FDIC "took it upon itself" to do so in this case because otherwise "there would be excess funds to pay the stockholders" (*id.* at 17a (quoting Herbert Decl.))—in other words, the government receiver decided to keep the money for itself, in contravention of its established policy, to avoid returning it to petitioner as required by statute. The FDIC ultimately "paid" itself $11,204,166 (of a total claimed of $23,020,785) in post-insolvency "interest" (*id.* at 39a-40a), thus depleting all remaining assets of the estate and leaving nothing for the shareholders.[1]

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[1] The FDIC also reimbursed itself for highly unusual expenses, purportedly incurred in connection with the operation of the receivership. These expenses included at least $4.2 million for salaries, $4.2 million for "overhead," $625,000 for travel expenses, and $2.8 million for other "professional fees." *See* C.A. App. A-100. In all, the FDIC charged the estate approximately $11 million in alleged liquidation expenses before all creditors were paid in 1990, and the FDIC's own documents reveal it paid itself another $3 million (including $1.94 million in salaries for 1994 alone) before the receivership was terminated in 1995—five years during which the receivership was essentially inactive. *See* C.A. App. A-123. And those assets that it could not reallocate to itself, the FDIC simply frittered away. Although an examination of the Bank a few months before its closure revealed no risk of significant loan losses, by the time the FDIC terminated the receivership it had lost over $15 million on loans and other assets—approximately 15 percent of the original estate. *See* C.A. App. A-109. Moreover, the FDIC's approach to liquidation minimized the value of the surviving estate. The government receiver stripped out and sold the high-yielding assets that were at the core of the